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Issue Date: 05 August 2003

CASE NO. 2003-LHC-00304

OWCP NO. 13-099889

In the Matter of:

BERNADINE LEWIS
Claimant,

v.

TRANS PACIFIC CONTAINER SERVICES CORP.,
Employer,

and

AMERICAN HOME ASSURANCE,
Insurer.

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For the Employer & Insurer

Before: Paul A. Mapes
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case arises under the Longshore and Harbor Workers' Compensation Act, as amended (hereinafter, the "Act" or the "Longshore Act"), 33 U.S.C. §901 *et seq.* In brief, Bernadine Lewis (hereinafter "the claimant"), alleges that she is permanently partially disabled as a result of injuries she suffered while engaged in longshore employment for Trans Pacific Container Services Corp. (hereinafter "the employer") on August 7, 2000. A trial on the merits of the claim was held in San Francisco, California, on April 28, 2003. During the trial, the following exhibits were admitted into

evidence: Claimant's Exhibits (CX) 1-7 and Employer's Exhibits (EX) 1-11 and 16. Both the claimant and the defendants filed post-trial briefs.

BACKGROUND

The claimant was born on July 30, 1955 and was first employed as a longshore worker in 1991. CX 1 at 1, Tr. at 33. In 1997, she became a full "A-Card" member of the International Longshore and Warehouse Union (ILWU). Tr. at 35.

While the claimant was working as a tractor driver on August 7, 2000, an overhead container crane accidentally lifted her tractor approximately two feet into the air before the vehicle dropped back down to the ground. CX 1 at 1, CX 3 at 53, Tr. at 35, 44-48. According to the claimant, when the tractor landed on the ground, she lost her balance, her legs went up, and her body collided with the tractor's console and steering wheel. Tr. at 48. Thereafter, she was taken to a nearby hospital emergency room, where she complained that she was "sore all over" and received treatment for a contusion to her right leg. Tr. at 48-49, CX 3 at 43-54.

On August 9, 2000, the claimant returned to the emergency room and reported that in addition to right leg pain she was experiencing pain her neck, back, and right index finger. CX 3 at 34-42, Tr. at 49-50. The claimant was given a splint for her finger and a referral for a physical therapy evaluation. Tr. at 49-50.

Thereafter, the claimant began receiving treatment from Dr. Fred Blackwell, a board-certified orthopedic surgeon. CX 3 at 55-92. According to a report Dr. Blackwell prepared on August 18, 2000, the claimant told him that she was having pain in her right hand, left shoulder, upper and lower back, and right leg. CX 3 at 75. Dr. Blackwell's examination indicated that the claimant had only 80 percent of a normal range of motion in her left shoulder and a very limited range of motion in her back. CX 3 at 77. Dr. Blackwell concluded that the claimant had suffered various types of sprains and prescribed anti-inflammatory medication.

On September 20, 2000, the claimant was examined at the insurer's request by Dr. Bobby Tay, an orthopedic surgeon. EX 9 at 84-92. In a report issued on October 30, 2000, Dr. Tay indicated that the claimant told him that she had stopped using some crutches that she had been given at the emergency room, but was still using a cane. The report also noted that the claimant said that her condition had improved, but that she still had pain in her right shin, right index finger, back, and neck. When Dr. Tay examined the claimant, he found that she had only 50 percent of the normal range of rotation when her head was turned to the right or the left, but that her neck flexion and extension were normal. Dr. Tay also found negative results when the claimant was subjected to "credibility testing." Dr. Tay concluded that the claimant's work injury had not yet reached the point of maximum medical improvement and that her most significant injuries were the injuries to her right leg and index finger. He recommended that x-rays be taken of the claimant's right index finger and right knee. In addition, Dr. Tay concluded that the claimant should be temporarily precluded from

work that required prolonged sitting or standing and jobs that required prolonged use of her right arm.

On November 7, 2000, the claimant underwent a MRI scan of her cervical spine. CX 3 at 93-94. The radiologist's report indicated that the scan showed an apparent traumatic compression at levels C6 and C7, but that the fractures were of an "uncertain age." The report also indicated that there were moderate sized dorsal osteophytic ridges and/or disc bulges at C5-6 and C6-7, but that there was "no evidence" of any spinal cord compression, edema, or syrinx.

On December 22, 2000, chiropractor Sheila Wells prepared a report in which she indicated that the claimant had complaints of back pain that radiated into her right leg. EX 8 at 47. Dr. Wells proposed that the claimant be treated by means of chiropractic manipulation and acupuncture.

On January 9, 2001, Dr. Blackwell sent a letter to the employer's counsel concerning the claimant's medical treatment. CX 3 at 85-87. In the letter, Dr. Blackwell noted that the MRI scan of the claimant's neck had revealed compression fractures at levels C6 and C7 of the claimant's cervical spine, but that he could not tell when the fractures occurred. Dr. Blackwell further indicated that the claimant had not responded well to chiropractic treatment and that her current complaints were principally focused on her neck and back. These conditions, he added, were aggravated by prolonged standing or walking. Dr. Blackwell also noted that the claimant's back and neck mobility remained "guarded with certain movements" but that the claimant's continued use of a cane was not warranted by any muscle weakness or motor dysfunction. Dr. Blackwell acknowledged that he had read the report of Dr. Tay and did not disagree with the report. Nonetheless, he added, Dr. Tay's prediction that the claimant would be able to return to work within six weeks of Dr. Tay's examination had not "held true." In concluding, Dr. Blackwell opined that the claimant would be able to "resume full work" in three to four weeks, but added that he couldn't yet determine if the claimant would have any permanent disability.

On March 19, 2001, Dr. Blackwell examined the claimant and noted on a "treating physician's progress report form" that the claimant had made "progressive improvement that has stabilized at a level where with pain meds and back support she should be able to function at work." EX 8 at 37. On the same form, Dr. Blackwell checked a box indicating that the claimant could "return to full duty" on March 19, 2001 "with no limitations or restrictions."

On March 19, 2001, the claimant returned to her job as a longshore worker. EX 11 at 141, EX 7 at 19. According to the claimant's testimony, even though she returned to work on that day, she had not fully recovered from her work injury and still had neck and back problems. Tr. at 53-54. Nonetheless, she testified, she returned to work because her benefits had been terminated and she needed an income. Tr. at 53. She further testified that she didn't seek any work restrictions from Dr. Blackwell because it is her understanding that the ILWU does not allow any members to return to work with any sort of restrictions. Tr. at 55-56.

According to the testimony of Dr. Blackwell, the claimant's return to work on March 19 was the result of a "mutually agreed upon decision" that she could return to work. Tr. at 102. However, he testified, he advised her that when she returned to work "she should avoid certain things" and exercise faithfully. Tr. at 102. In particular, he testified, he advised the claimant that "she should avoid bending repetitively, frequent lifting, bending and twisting simultaneously, reaching and simultaneously lifting," and similar activities. Tr. at 103-04. Dr. Blackwell also testified that he allowed the claimant to return to work without restrictions because he understands that injured longshore workers are not permitted to return to work with formal restrictions. Tr. at 104, 119-20, 134-35. He added that he understands that the claimant has some control over the jobs that she takes and that he felt that this flexibility was important. Tr. at 106.

On April 13, 2001, the claimant was examined at the insurer's request by Dr. Marvin B. Zwerin, a doctor of osteopathy. EX 10 at 93-103. According to Dr. Zwerin's report, the claimant told him that she had returned to work on March 19, 2001, but it had been "hard" and she was "stiffening up." She also reportedly told Dr. Zwerin that she continued to have neck pain that sometimes went down the center of her back and that she had a "throbbing aching pain" in her low back that would sometimes radiate to her left buttock and leg. Dr. Zwerin noted that the claimant did not seem to be dissembling or appear depressed. When Dr. Zwerin examined the claimant, he found that she had normal ranges of motion in her neck, but that her lumbar range of flexion motion was only 50 percent of normal. Dr. Zwerin concluded that all of the claimant's work injuries had resolved except for residual low back pain and a restriction in lumbar flexion. He further concluded that her condition had become permanent and stationary and that she could resume her customary occupation without restrictions. He also opined that the claimant would not need any future medical care, but that it would be appropriate to offer the claimant a one-year membership in a gym in lieu of providing her with physical therapy. During the trial, Dr. Zwerin reiterated his opinion that the claimant's medical condition did not warrant any work restrictions and further testified that none of the information subsequently provided by Dr. Blackwell has given him any reason to change that opinion. Tr. at 143, 166. Dr. Zwerin also testified that in his opinion the limitations suggested by Dr. Blackwell during his trial testimony don't "make sense." Tr. at 146.

On April 26, 2001, the claimant returned to Dr. Blackwell and reported that she was "doing fairly well" but had continued "neck pain and stiffness." CX 3 at 87. Dr. Blackwell renewed the claimant's prescription for Vicodin and recommended that she be given a one-year gym membership.

On June 1, 2001, Dr. Blackwell sent a letter to the employer's claims manager concerning the report of Dr. Zwerin. EX 8 at 33. In the letter, Dr. Blackwell agreed with Dr. Zwerin's determination that there were no prior injuries that contributed to the claimant's impairment. Dr. Blackwell also noted that it would be appropriate to determine a permanent and stationary date for the claimant, but indicated that he did not want to make such a determination until the claimant had completed approximately two months of a gym membership. On the same day, Dr. Blackwell conducted another examination of the claimant. CX 3 at 88. During the exam, the claimant reported that she was doing fairly well, but was finding that tractor driving was "hard for her" and aggravated her "back complaints." Dr. Blackwell continued the claimant's prescription for Vicodin.

The claimant was again examined by Dr. Blackwell on August 30, 2001. CX 3 at 89. According to Dr. Blackwell's notations, the claimant reported that she was having on-going problems with her "neck and back." Dr. Blackwell continued the claimant's Vicodin prescription and also gave her a prescription for Celebrex. A month later, the claimant returned to Dr. Blackwell for an office visit and reported that she was having on-going problems with "morning stiffness." CX 3 at 90. Dr. Blackwell again continued the claimant's Vicodin prescription and gave her a new prescription for Vioxx.

On November 5, 2001, the claimant reported to Dr. Blackwell that she was having no new problems and was handling her symptoms by using Vioxx. CX 3 at 91. However, on December 21, 2001, the claimant told Dr. Blackwell that she was having "persistent pain and discomfort" in her back. CX 3 at 92.

The claimant was next examined by Dr. Blackwell on May 2, 2002. According to Dr. Blackwell's trial testimony, by this time the claimant's neck condition was largely resolved. Tr. at 109. However, he testified, his examination indicated that there was a "great deal of irritability" in the claimant's lower back and a diminished range of motion. Tr. at 108. In addition, he noted, the claimant reported to him that she was having difficulty getting relief by any means and was experiencing some numbness in both her legs. Tr. at 108. Dr. Blackwell further testified that by the time of this examination the claimant should have been avoiding activities that required prolonged standing and walking, climbing, squatting or kneeling, repetitive bending, lifting or twisting, or handling of objects weighing more than 10 or 15 pounds. Tr. at 108.

On July 6, 2002, the claimant suffered a second work-related injury when a tractor she was driving was rear-ended by another vehicle. Tr. at 66-67, EX 11 at 126, 141. Shortly thereafter, she sought treatment for this second injury from Dr. Blackwell. EX 11 at 141-43, 144. In a July 17, 2002 report concerning this new injury, Dr. Blackwell commented as follows:

> Bernadine has a long-standing problem of pain with her lower back. With the prior work injury of 8/7/0 she had fully recovered from her complaints of neck pain and there was no residual disability associated with it. The lower back, however, was still symptomatic and she was using medications for it but not taking physical therapy. As indicated, the patient was employed without restrictions.

EX 11 at 142.

On September 16, 2002, the claimant underwent a MRI scan of her lumbar spine. EX 11 at 145. According to the radiologist's report, the only notable abnormality was degenerative disc disease at L5-S1 that did not cause significant spinal stenosis or neural foraminal narrowing.

According to the claimant's trial testimony, her work activities during the period between March 19, 2001 and her second injury in July of 2002 were limited by her neck and back impairments. In fact, she testified, she could not have returned to work without using the pain medications

prescribed by Dr. Blackwell. Tr. at 56. In addition, the claimant asserted that her back problems caused her to avoid the more onerous longshore jobs, such as jobs that required her to "lash" containers onto ships and jobs where she had to repeatedly lift baggage. Tr. at 60-61. On some occasions when such jobs were the only jobs available to her, she testified, she just went home. Tr. at 61. Most of the time, the claimant recalled, she worked as a tractor driver, but she asserted that even that job was difficult to tolerate for more than two or three days a week. Tr. at 57-58. As a result, she testified, she would sometimes turn down such jobs. Tr. at 64.

The claimant's characterization of her post-injury work activities was disputed by Dr. Zwerin, who opined that the claimant's wage records show that she was "working harder" in 2001 and 2002 than she was in 2000. Tr. at 147-49. As well, he asserted, the claimant was "stronger" in June of 2002 than when she returned to work in March of 2001. He supported this opinion by pointing out that the claimant received no treatment "of any consequence" after returning to work and had no "objective findings" concerning her back when examined by multiple physicians. Tr. at 146.

Review of the claimant's payroll records indicates that during the 475-day period between the claimant's return to work on March 19, 2001 and her second injury on July 7, 2002, she earned a total of $77,045.64, including holiday and vacation pay. EX 7 at 19-27. Thus, during that 67.85-week period she earned an average of $1,135.52 per week[1] The wage records also indicate that during this period she worked for 243 days as a tractor driver, nine days as a holdman, six days as a dockman, six days as a lasher, one day as a "baggage man," and four days in miscellaneous other jobs. EX 7 at 19-27. These records also show that during this period, the claimant worked back-to-back shifts on three occasions and that on two other occasions she worked more than one shift in a 24-hour period. EX 7 at 19-27.

ANALYSIS

The parties have stipulated: (1) that the claimant sustained an injury arising out of and in the course of her employment on August 7, 2000, (2) that the injury occurred on a maritime situs while the claimant was employed in a maritime status, (3) that the injury occurred at a time when there was an employer-employee relationship between the claimant and the employer, (4) that the claimant's notice of injury and claim for compensation were timely, and (5) that the claimant's average weekly wage at the time of the August 7, 2000 injury was $1,425.52, (6) that the claimant's injury reached the point of maximum medical improvement on March 18, 2001, and (7) that "double back" shifts were unilaterally stopped by the ILWU in June of 2002, but that at any time the union could unilaterally decide to again allow such shifts.

[1]According to the payroll records, her earnings by quarter were as follows: First Quarter of 2001 (March 19-23 only), $968.42; Second Quarter of 2001, $13,165.67; Third Quarter of 2001, $16,283.01; Fourth Quarter of 2001, $10,545.30; First Quarter of 2002, $15,402.34; Second Quarter of 2002, $17,366.81; and Third Quarter of 2002 (June 23-July 6 only), $3,314.09. EX 7 at 19-27.

The parties have only one dispute: the extent of the claimant's entitlement to permanent partial disability benefits. In this regard, the claimant contends that her August 7, 2000 work injury caused her earning capacity to be reduced to $1,164.60 per week. In contrast, the employer contends that the claimant's August 2000 work injury did not cause any permanent diminution in the claimant's wage earning capacity.

In cases involving disputes over an injured worker's post-injury wage-earning capacity, the burden is initially on a claimant to show that he or she cannot return to his or her regular employment due to the work-related injury. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980); *Trask v. Lockheed Shipbuilding Co.*, 17 BRBS 56, 59 (1980). If a claimant meets this burden, the employer must then establish the existence of specific and realistically available job opportunities within the geographic area where the claimant resides which a person with the claimant's technical and verbal skills is capable of performing. Under the provisions of subsection 8(c)(21) of the Act, an injured worker's compensation must be based on the difference between the worker's pre-injury average weekly wage and his or her post-injury earning capacity in the alternative work. In addition, subsection 8(h) of the Act provides that when an injured worker has been employed following an injury, the worker's actual post-injury earnings shall be considered indicative of his or her post-injury earning capacity, if such actual earnings "fairly and reasonably represent" the worker's wage-earning capacity. *See Devillier v. National Steel and Shipbuilding Co.*, 10 BRBS 649, 660 (1979). Whichever party contends that actual post-injury earnings are not representative of a claimant's true wage-earning capacity has the burden of proving that those earnings are not representative. *Burch v. Superior Oil Co.*, 15 BRBS 423, 427 (1983); *Bethard v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 691, 693 (1980). As well, the party contending that a claimant's post-injury wages are not representative has the burden of establishing an alternative wage earning capacity. *Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66, 69 (1988), *aff'd sub nom. J. M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180 (9th Cir. 1990).

In this case, the claimant's contentions about her loss of wage-earning capacity are supported by her own testimony, by the testimony of Dr. Blackwell, and by wage records showing that the claimant's earnings declined to an average of $1,135.52 per week in the 475-day period between March 19, 2001 and July 7, 2002. In contrast, the employer's contentions are supported by the testimony of Dr. Zwerin and by entries in the claimant's payroll records showing that after her first work injury she occasionally worked as a lasher or baggage handler and on several occasions worked back-to-back shifts.

After giving full consideration to all of foregoing testimony and exhibits, it is concluded that the preponderance of the evidence indicates that the claimant's August 7, 2000 work injury caused her wage earning capacity to permanently decline from $1,425.52 per week to $1,135.52 per week.[2] She is therefore entitled to receive weekly permanent partial disability benefits of $193.33 (i.e., two-

[2]In this regard, it is recognized that the claimant has calculated that her post-injury earnings declined to a different amount---$1,164.60 per week. However, this calculation does not correspond to the claimant's payroll records and is apparently the result of one or more mathematical errors.

thirds of the difference between $1,425.52 and $1,135.52). There are four reasons for this conclusion.

First, although Dr. Blackwell signed a series of forms indicating that the claimant could return to work without restrictions, his testimony sets forth entirely credible reasons for concluding that the claimant nonetheless had continuing limitations in her ability to perform some of the longshore jobs that she had previously performed. The fact that Dr. Blackwell did not formally impose such limitations means only that he chose to give the claimant the option of using the ILWU's hiring hall process to seek only those longshore jobs and work times that were within her limitations. If he had not done so, union rules would have totally precluded the claimant from performing any type of longshore work and thereby dramatically decreased her earning power.

Second, although there is little objective medical evidence to corroborate the claimant's description of her limitations, there is also very little evidence to suggest that the claimant is feigning her symptoms. Indeed, all three of the physicians who examined the claimant concerning her August 2000 injury have indicated that she is a credible patient. Moreover, Dr. Blackwell's treatment records fully corroborate her claims of on-going medical limitations and her continuing need for pain medications.

Third, although the claimant's payroll records indicate that in the 16 months after the claimant returned to work in March of 2001, there were five occasions when she worked more than one shift in a single day, six occasions when she worked as a lasher, and one occasion when she worked as a "baggage man," her payroll records also show that in the shorter 12-month period preceding her August 2000 injury there were a total of 17 occasions when she worked more than one shift in a single day, 12 occasions when she worked as a lasher, and six occasions when she worked as a "baggage man." Moreover, the payroll records also indicate that after returning to work in March of 2001 the claimant tended to work fewer days in a row as a tractor driver than she did before her August 2000 injury.

Fourth, although Dr. Zwerin has opined that the claimant's August 2000 work injury did not result in any permanent limitations, his opinion is based on only one examination of the claimant and is less persuasive than the opinion of Dr. Blackwell, who examined the claimant on numerous occasions. In addition, the claimant's payroll records are inconsistent with Dr. Zwerin's assertion that these records demonstrate that she has no permanent impairment.

ORDER

1. The employer shall pay the claimant temporary total disability benefits for the period between August 7, 2000 and March 17, 2001 at a compensation rate of $901.28 per week

2. Beginning on March 18, 2001 and until ordered otherwise, the employer shall pay the claimant permanent partial disability benefits at a rate of $193.33 per week.

3. The employer shall pay interest to the claimant on each unpaid installment of compensation from the date the compensation became due at the rates to be determined by the District Director.

4. The employer shall receive credit for all compensation paid to the claimant since August 7, 2000.

5. The District Director shall make all calculations necessary to carry out this order.

6. The employer shall provide the claimant all medical care that may be reasonable and necessary for the treatment of the sequelae of her August 7, 2000 injury.

7. Counsel for the claimant is hereby ordered to prepare an Initial Petition for Fees and Costs and is directed to serve such petition on the undersigned and on the counsel for the employer within 20 calendar days after the service of this Decision and Order by the District Director. Within 20 calendar days after service of the fee petition, the counsel for the employer shall initiate a verbal discussion with the counsel for the claimant in an effort to amicably resolve any dispute concerning the amounts requested. If the two counsel thereby agree on the amounts to be awarded, they shall promptly file a written notification of such agreement. If the counsel fail to amicably resolve all of their disputes, the counsel for the claimant shall, within 30 calendar days after the date of service of the initial fee petition, provide the undersigned and the counsel for the employer with a Final Application for Fees and Costs which shall incorporate any changes agreed to during his discussions with the counsel for the employer and shall set forth therein the final amounts he requests as fees and costs. Within 14 calendar days after service of the Final Application, the counsel for the employer shall file a Statement of Final Objections and serve a copy on the counsel for the claimant. No further pleadings will be accepted unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed.

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Paul A. Mapes
Administrative Law Judge